RECORD AND BRIEFS

No. 10-1491

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ESTHER KIOBEL, ET AL.,

Petitioners,

—v.—

ROYAL DUTCH PETROLEUM CO., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FORMER UNITED STATES DIPLOMATS DIEGO ASENCIO, HARRIET BABBITT, HARRY BARNES, J.D. BINDENAGEL, JACK BINNS, JAMES BISHOP, WILLIAM BREER, KENNETH BRILL, JAMES BULLOCK, W. HODDING CARTER III, GOODWIN COOKE, PATRICIA DERIAN, F. ALLEN "TEX" HARRIS, WILLIAM HARROP, ALLEN HOLMES, MARILYN MCAFEE, THOMAS MCNAMARA, ARTHUR MUDGE, JAMES O'BRIEN, THOMAS PICKERING, EDWARD STREATOR, ALEXANDER WATSON AND ROBERT WHITE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DOUGLASS CASSEL
Counsel of Record
2142 Eck Hall of Law
Notre Dame Law School
Notre Dame, Indiana 46556
(574) 631-7895
Doug.Cassel@nd.edu

LEO P. CUNNINGHAM
LEE ANNE V. MULHOLLAND
CHARLENE KOSKI
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, California 94304
(650) 493-9300
wsgr@wsgr.com

Attorneys for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, former United States diplomats and State Department officials, submit this brief in support of two propositions. First, lawsuits in United States courts, seeking redress for gross violations of human rights committed abroad, are sometimes consistent with American foreign policy and sometimes not. Second, rather than reject all such suits for fear of adverse foreign policy impacts, courts should consult the Executive Branch for its views on a case-by-case basis and, if necessary, avoid adverse impacts by narrowing the claims.

Amici are the following former United States diplomats and State Department officials:

Diego C. Asencio served as Ambassador to Colombia from 1977 to 1980, Assistant Secretary of State for Consular Affairs from 1980 to 1983, Ambassador to Brazil from 1983 to 1986, and Chairman of the Commission for the Study of International Migration and Cooperative Economic Development from 1987 to 1989.

Harriet C. Babbitt served as Ambassador and Permanent Representative of the United States to the Organization of American States from 1993 to 1997, and as Deputy Administrator of the United States Agency for International Development from 1997 to 2001.

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[1] The parties in the petitions have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no person or entity other than the *amici curiae* or their counsel of record has made a monetary contribution to the preparation or submission of this brief.

Harry G. Barnes, Jr., served as Ambassador to Romania from 1974 to 1977, Director General of the Foreign Service and Director of Personnel in the Department of State from 1977 to 1981, Ambassador to India from 1981 to 1985 and Ambassador to Chile from 1985 to 1988.

J.D. Bindenagel was Ambassador and Special Envoy for Holocaust issues from 1999 to 2002 and U.S. Special Negotiator for Conflict Diamonds from 2002 to 2003. During his 28-year career as a Foreign Service Officer he served in Asia and in Europe.

Jack Binns was Ambassador to Honduras from 1980 to 1981 and Deputy Chief of Mission in Spain and Costa Rica. During his twenty-five years in the Foreign Service, he served throughout Latin America and Western Europe.

James Bishop was Deputy Assistant Secretary of State for Africa from 1981 to 1987 and Principal Deputy Assistant Secretary of State for Human Rights and Humanitarian Affairs from 1991 to 1993. During his 33 years as a U.S. Foreign Service Officer, he also served as Ambassador to Niger from 1979 to 1981, Ambassador to Liberia from 1987 to 1990 and Ambassador to Somalia from 1990 to 1991.

William Breer was a career Foreign Service Officer for 35 years, retiring with the rank of Minister Counselor. His posts included service as Deputy Chief of Mission in the United States Embassy to Japan and as a senior member of the Policy Planning staff.

Kenneth Brill served as acting-Ambassador to India from 1993 to 1994, Ambassador to Cyprus from 1996 to 1999, and Ambassador to the International Atomic Energy Agency and to the United Nations Office in Vienna from 2001 to 2004. Among other Foreign Service career posts, he served as Executive Secretary of the Department of State from 1994 to 1996, and acting-Assistant Secretary and Principal Deputy Assistant Secretary of State for the Bureau of Oceans and International Environmental and Scientific Affairs from 1999 to 2001. He also served as founding Director of the U.S. National Counterproliferation Center, in the Office of the Director of National Intelligence, from 2005 to 2010.

James L. Bullock is Minister Counselor, retired. His final post was as Minister Counselor for Public Affairs at the U.S. Embassy in Paris from 2006 to 2009. Among other posts in his 30-year Foreign Service career, he served in Embassy section head assignments in several Arab world capitals and as press attaché at the U.S. Embassy in Moscow.

W. Hodding Carter III was Assistant Secretary of State for Public Affairs from 1977 to 1980.

Goodwin Cooke was Ambassador to the Central African Republic from 1978 to 1980. His twenty-five year Foreign Service career also included postings in Asia, Europe, Canada and elsewhere in Africa.

Patricia Derian was Assistant Secretary of State for Human Rights and Humanitarian Affairs from 1977 to 1981.

F. Allen "Tex" Harris retired after serving with the Department of State for thirty-five years, including Foreign Service posts in Argentina, Australia, South Africa and Venezuela. He is a past President of the American Foreign Service Association.

William C. Harrop served as Ambassador to Guinea from 1975 to 1977, Deputy Assistant Secretary of State for Africa from 1977 to 1980, Ambassador to Kenya from 1980 to 1983, Inspector General of the Department of State and the Foreign Service from 1983 to 1987, Ambassador to Zaire from 1987 to 1991, and Ambassador to Israel from 1991 to 1993.

Allen Holmes served as Ambassador to Portugal from 1982 to 1985, Assistant Secretary of State for Political-Military Affairs from 1985 to 1989, and Assistant Secretary of Defense for Special Operations and Low Intensity Conflict from 1993 to 1999.

Marilyn McAfee was a career foreign service officer from 1968 to 1998. She served as Ambassador to Guatemala from 1993 to 1996. Other postings included Nicaragua, Iran, Washington, Costa Rica, Venezuela, Chile and Bolivia, where she was Deputy Chief of Mission from 1989 to 1992. In 1997 she was designated Assistant Inspector General for Inspections, and subsequently Acting Deputy Inspector General of the Department of State.

Thomas McNamara was Assistant Secretary of State for Political-Military Affairs from 1994 to 1998. Among other senior posts in his Foreign Service Career, he served as Ambassador to Colombia from 1988 to 1991 and as Ambassador-at-large for Counterterrorism.

Arthur Mudge served as United States Agency for International Development Assistant General Counsel from 1967 to 1969, USAID Mission Director in Guyana from 1974 to 1976, USAID Mission Director in Nicaragua from 1976 to 1978, and USAID Mission Director in Sudan from 1980 to 1983.

James O'Brien was Special Envoy for the Balkans, Principal Deputy Director for Policy and Planning at the State Department, and Attorney Adviser at the State Department from 1989 - 2001.

Thomas R. Pickering was Under Secretary of State for Political Affairs from 1997 to 2001. He also served as Ambassador to Jordan from 1974 to 1978, Assistant Secretary of State for Oceans, Environment and Science from 1978 to 1981, Ambassador to Nigeria from 1981 to 1983, Ambassador to El Salvador from 1983 to 1985, Ambassador to Israel from 1985 to 1988, Ambassador and Representative to the United Nations from 1989 to 1992, Ambassador to India from 1992 to 1993, and Ambassador to the Russian Federation from 1993 to 1996.

Edward Streator was Ambassador to the Organization for Economic Cooperation and Development from 1984 to 1987. Among other posts as a Foreign Service Officer, he served as

Deputy Chief of Mission in the United States Embassy to NATO from 1975 to 1977 and in the United States Embassy to the United Kingdom from 1977 to 1984.

Alexander F. Watson served as Ambassador to Peru from 1986 to 1989, Ambassador and Deputy Permanent Representative to the United Nations from 1989 to 1993, and Assistant Secretary of State for Western Hemisphere Affairs from 1993 to 1996.

Robert White served as Ambassador to Paraguay in 1977 to 1980 and Ambassador to El Salvador in 1980 to 1981. Among other posts during his 25-year career as a Foreign Service Officer, he also served as Latin American Director of the Peace Corps and as Deputy Permanent Representative to the Organization of American States.

As former diplomats and State Department officials with collectively broad and diverse experience, *amici* are uniquely suited to comment on whether lawsuits in the United States seeking redress for overseas human rights violations are, by definition, inconsistent with American foreign policy interests, or whether they are instead, in many cases, helpful tools to implement our long-standing foreign policy commitment to human rights worldwide.

SUMMARY OF ARGUMENT

Amici curiae are former United States diplomats and State Department officials. *Amici* submit this brief in support of two propositions. First, lawsuits in United States courts, seeking redress for

gross violations of human rights committed abroad, are sometimes consistent with American foreign policy and sometimes not. Second, rather than reject all such suits for fear of adverse foreign policy impacts, courts can consult the Executive Branch for its views and make decisions on a case-by-case basis. Where appropriate, courts can avoid adverse foreign policy impacts by narrowing the scope of the litigation.

Amici understand that on March 5, 2012, the Court restored this case to the calendar for reargument on the following question:

> "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

Amici take no position on the legal question of whether the Alien Tort Statute ("Statute" or "ATS") should be so interpreted.[2] We address only a narrow question within our professional expertise, namely whether suits brought under the Statute in United States courts for gross violations of human rights committed on the territory of a foreign sovereign are necessarily inconsistent with American foreign policy interests. We address this question because other *amici* in this case argue that such litigation "interferes with

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[2] Nor do *amici* express any view on the questions posed in the original argument in this case, concerning whether corporations, as opposed to natural persons, can be sued under the Alien Tort Statute.

U.S. foreign relations."[3] Based on our collective experience, however, we believe that whether such suits hinder or promote American foreign policy can only be determined on a case-by-case basis.

Any such lawsuit may affect potentially conflicting foreign policy interests. On the one hand, suits seeking redress for gross violations of human rights committed abroad may often serve to support America's longstanding foreign policy commitment to worldwide respect for human rights. On the other hand, suits alleging violations committed on the territory of a foreign sovereign may sometimes become irritants in bilateral relations with that sovereign and in some cases might not be the best way to defend our interest in human rights or might interfere or impact adversely on other, higher priority foreign policy issues of concern to the United States. Striking a balance between these potentially conflicting sets of interests is necessarily fact-and context-dependent. It can only be done on a case-by-case basis.

Moreover, striking that balance is a task within the unique expertise and responsibility of the Executive Branch. Courts are not designed or equipped to make foreign policy judgments. In all cases where serious questions arise of potential impact on foreign policy under doctrines such as political questions or act of state, courts are well-advised to seek and rely on the well-reasoned views of the Executive.

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[3] *E.g.*, Brief of Amici Curiae BP America at 8, *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (No. 10-1491), 2012 WL 392536 at *8 (noting concern that "ATS litigation involving conduct in other countries interferes with U.S. foreign relations").

Historically the Executive has favored some suits, and opposed others, depending on their impact on foreign policy in the circumstances. In some cases the answer is not simply whether or not to allow a case to proceed, but rather how to manage the litigation so as to mitigate or avoid adverse foreign policy impacts. In such cases courts can and have used the tools at their disposal to limit the claims, parties, or scope of discovery, thereby allowing vindication of human rights to some degree while minimizing negative foreign policy impacts.

To the extent the Court takes foreign policy impacts into account in deciding whether to allow suits for human rights violations overseas under the Statute, our experience counsels to avoid extremes. It would be imprudent to allow *all* cases challenging overseas human rights violations to proceed, no matter the foreign policy consequences. But it would be unduly restrictive to allow *none* to proceed, thereby depriving our country of an often valuable tool in support of our foreign policy commitment to worldwide respect for human rights. The approach most consistent with our foreign policy commitments is to make these determinations on a case-by-case basis, following consultation with the Executive, and where appropriate using judicial tools to manage the scope and hence the foreign policy impact of the litigation.

ARGUMENT

II. LAWSUITS CHALLENGING GROSS VIOLATIONS OF HUMAN RIGHTS COMMITTED OVERSEAS ARE SOMETIMES IN AMERICAN FOREIGN POLICY INTERESTS AND SOMETIMES NOT, AND SHOULD BE ALLOWED ON A CASE-BY-CASE BASIS.

America's foreign policy commitment to respect for human rights worldwide is longstanding and bipartisan. United States law declares that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[4] In 1992 President Bush reiterated "our commitment to ensuring that human rights are respected everywhere."[5] In 2009 Secretary of State Clinton reaffirmed that our "commitment to human rights starts with universal standards and with holding everyone accountable to those standards."[6] Similar statements have been made by Administrations of both parties over the last four decades.

This foreign policy commitment to human rights worldwide has often led the Executive either to support, or not to oppose, suits in United States

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[4] 22 U.S.C. § 2304(a)(1).

[5] *Statement on Signing the Torture Victim Protection Act of 1991*, 28 Weekly Comp. Pres. Doc. 465, 466 (Mar. 12, 1992).

[6] Hillary Rodham Clinton, *Remarks on the Human Rights Agenda for the 21st Century*, Georgetown University (Dec. 14, 2009), *available at* http://www.state.gov/secretary/rm/2009a/12/133534.htm.

courts seeking redress for gross violations of human rights allegedly committed on the territories of foreign sovereigns. For example, in the very first human rights case under the ATS in 1980,[7] the State Department submitted a brief in support of a Paraguayan victim's suit alleging torture and extrajudicial execution committed by a Paraguayan official on Paraguayan territory. With respect to the potential foreign policy impact, the State Department advised that where there is international consensus on a protected human right and on the scope of protection,

> there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.[8]

Similarly, in a 1995 ruling allowing two ATS suits to proceed against Bosnian Serb political leader Radovan Karadzic, the U.S. Court of Appeals for the Second Circuit noted that the plaintiffs in one suit had asked the State Department for its views. "Far from intervening in the case to urge rejection of the suit on the ground that it presented political questions," the Court observed, "the Department responded with a letter indicating that Karadzic was not immune from

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[7] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

[8] Memorandum for the United States as *Amicus Curiae* at 22-23, *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 19 I.L.M. 585, 604 (1980).

suit as an invitee of the United Nations."[9] Making clear that American foreign policy supported the suit, the State Department added,

> We share your repulsion at the sexual assaults and other war crimes that have been reported as part of the policy of ethnic cleansing in Bosnia-Herzegovina. . . . This information is being investigated by a United Nations Commission of Experts, which was established at U.S. initiative.[10]

Responding to an inquiry from the court in the companion case, the Solicitor General and the State Department Legal Advisor jointly answered: "Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute . . . that might raise a political question, this is not one of them."[11]

Again, in 1997 the State Department advised a district court in an ATS suit alleging gross violations of human rights in Burma that "at this time adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma."[12]

In 2010, when the United States recognized Somalia as a sovereign State, but did not recognize any entity as its government, the Executive

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[9] *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995).

[10] *Id.* at 250 n.10.

[11] *Id.* at 250.

[12] *Nat'l Coalition Gov't of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 335, 362 (C.D. Cal. 1997).

submitted an *amicus* brief to this Court opposing dismissal of an ATS suit for gross violations of human rights in Somalia on grounds of statutory immunity.[13] In specifying the "[i]nterest of the United States," the Brief stated in part, "The United States condemns grave human rights abuses of the kind alleged in the complaint in this case, and it has a strong foreign policy interest in promoting the protection of human rights."[14]

Most recently, the Executive submitted an *amicus* brief in support of plaintiffs in the case at bar, an ATS suit alleging gross violations of human rights in Nigeria. The brief identified the "[i]nterest of the United States" as follows: "The United States has an interest in the proper application of the ATS because such actions can have implications for the Nation's foreign and commercial relations and for the enforcement of international law."[15]

These diverse cases—involving repressive regimes in Latin America and Asia, war crimes in Bosnia and Somalia, and military assaults on civilians in Nigeria—illustrate the variety of reasons why suits in United States courts for gross violations of human rights allegedly committed on the territory of a foreign sovereign can be in the interests of American foreign policy. Over more

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[13] Brief for the United States as *Amicus Curiae* at 1, *Samantar v. Yousuf*, 130 S. Ct. 1499 (No. 08-1555), 2010 WL 342031 at *1.

[14] *Id.*

[15] Brief for the United States as *Amicus Curiae* at 1, *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (No. 10-1491), 2011 WL 6425363 at *1.

than three decades, the unifying theme of case-by-case Executive support for such lawsuits has been our foreign policy commitment to respect for human rights worldwide.

Important as that commitment may be, however, it does not always carry the day in the face of such competing and weighty foreign policy concerns as our relationship with China. In 2002, for example, the State Department expressed concerns that an ATS suit by Falun Gong practitioners against Chinese officials was "not the best way for the United States to advance the cause for human rights in China." The State Department advised the court: "Practical considerations, when coupled with the potentially serious adverse foreign policy consequences that such litigation can generate, would in our view argue in favor of finding the suits non-justiciable."[16]

Without taking a position on the foreign policy advisability of any particular case, *amici* draw the general lesson from their collective experience that lawsuits in our courts for gross violations of human rights committed on the territory of foreign nations are sometimes in the foreign policy interests of the United States, and sometimes not, and that the determination must be made on a case-by-case basis.

Moreover, in order to make these determinations under such existing doctrines as political questions and acts of state, the courts do and appropriately should call on the expertise of the

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[16] *Doe v. Qi*, 349 F. Supp. 2d 1258, 1271 (N.D. Cal. 2004) (alteration in original) (quoting Statement of Interest of the United States at 7-8, Sept. 27, 2002).

Executive branch, to whose well-reasoned views the judiciary should and normally does defer on questions of foreign policy.

For these reasons, *amici* suggest that foreign policy concerns do not consistently counsel against allowing suits in United States courts for human rights violations committed overseas. On the contrary, the longstanding American foreign policy commitment to respect for human rights worldwide argues for allowing such suits on a case-by-case basis, after consultation with the Executive Branch.

II. EVEN WHERE FOREIGN POLICY OBJECTIONS ARISE, THEY CAN SOMETIMES BE MANAGED BY NARROWING THE ISSUES WITHOUT DISMISSING AN ENTIRE HUMAN RIGHTS CASE.

In some cases, foreign policy objections may relate only to particular claims or particular defendants. An example is provided by an ATS suit against several oil companies, including one partially owned by the Indonesian government, for gross violations of human rights allegedly committed in Indonesia by their security force contractor, namely the Indonesian military. In a 2002 Statement of Interest and a 2005 follow-up letter to the court, the State Department gave nuanced advice. As summarized by the court, the State Department:

> "believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related

> directly to the on-going struggle against international terrorism." The State Department observed, however, that its assessment was "necessarily predictive and contingent" on how the case proceeded, including the intrusiveness of discovery and the extent to which the case required "judicial pronouncements on the official actions of the [Government of Indonesia] with respect to its military activities in Aceh."[17]

The court responded by narrowing the claims, parties and scope of discovery. To avoid embarrassment to the Indonesian government, the court dismissed the international law claims of genocide and crimes against humanity, allowing only the common law tort claims to proceed. The court also dismissed the one company partially owned by the Indonesian government, allowing the suit to proceed only against private companies. Finally, the court ordered, "Discovery should be conducted in such a manner so as to avoid intrusion into Indonesian sovereignty. To this end, there will be firm control over any discovery conducted by plaintiffs."[18]

Without venturing an opinion on the rulings in this individual case, *amici* suggest that they illustrate the tools of judicial management available to courts in cases where foreign policy objections

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[17] *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22 (D. D.C. 2005) (alteration in original) (emphasis omitted) (quoting Statement of Interest of the U.S. State Dept., July 29, 2002). (The case has a complicated subsequent history, with multiple reported decisions.)

[18] *Exxon*, 393 F. Supp. 2d at 29.

may relate only to a part of the case rather than to the whole. Such a narrowing approach can allow partial vindication of the United States foreign policy interest in promoting respect for human rights, while accommodating competing foreign policy concerns.

The possibility of narrowing the issues in appropriate cases provides an additional reason why potential foreign policy concerns should not lead to the wholesale rejection of suits in our courts for gross violations of human rights allegedly committed in other countries.

CONCLUSION

For the foregoing reasons, *amici* respectfully suggest that foreign policy concerns do not support a wholesale rejection of suits in United States courts for gross violations of human rights allegedly committed in other countries. On the contrary, the longstanding American foreign policy commitment to respect for human rights worldwide, the historic practice of the Executive Branch, and the judicial management tools available to courts, all counsel in favor of allowing such suits on a case-by-case basis, following consultation with the Executive Branch.

Respectfully submitted,

DOUGLASS CASSEL
Counsel of Record
2142 Eck Hall of Law
Notre Dame Law School
Notre Dame, Indiana 46556
(574) 631-7895
Doug.Cassel@nd.edu

LEO P. CUNNINGHAM
LEE ANNE V. MULHOLLAND
CHARLENE KOSKI
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, California 94304
(650) 493-9300
wsgr@wsgr.com

Attorneys for Amici Curiae